

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Midcontinent Independent) Docket Nos. ER13-2379-003
System Operator, Inc.)

**MOTION TO FILE COMMENTS OUT OF TIME AND
COMMENTS OF THE ORGANIZATION OF MISO STATES**

Pursuant to Rule 211 and 212 of the Rules of Practice and Procedure of the Federal Energy Regulatory Commission (“Commission”), 18 C.F.R. § 385.211 and 385.212, the Organization of MISO States (“OMS”) respectfully submits the following motion to file comments out of time and comments in the above-captioned docket in response to the *Compliance Filing Revising Attachment O Formula Rate Protocols* filing submitted to the Commission by the Midcontinent Independent System Operator, Inc. (“MISO”) and the MISO Transmission Owners on May 19, 2014 (“May 19 Filing”). On May 19, 2014, the Deputy Secretary of the Commission issued a notice regarding the May 19 Filing, setting June 9, 2014, as the deadline for comments and protests.

The OMS filed a Notice of Intervention on September 20, 2013, Comments on October 18, 2013, an Answer on December 5, 2013 and a Request for Rehearing on April 4, 2014 in the above captioned docket. The OMS, therefore, is a party to these proceedings.

I. MOTION TO FILE COMMENTS OUT OF TIME

Pursuant to Rule 212 of the Rules of Practice and Procedure of the Commission, 18 C.F.R. §385.212, the OMS submits this motion to file comments out of time in the above-captioned docket. The members of the OMS are the state utility regulatory commissions in the

MISO footprint. Because the outcome of this proceeding will have an impact on ratepayers in the MISO footprint, the OMS' comments are in the public interest. The filing deadline established by the Commission in this case fell in between regularly scheduled meetings of the OMS Board of Directors. The OMS Board took up this issue at the earliest possible regularly scheduled Board meeting following the May 19 Filing.

With these comments, the OMS does not wish to disrupt or delay the proceeding and accepts the record to date. Because no other party can adequately represent the interests of the OMS' members, and because the OMS Board acted as timely as possible given its meeting schedule, good cause exists to grant this motion.¹ As such, the OMS respectfully requests that the Commission grant this motion to file comments out of time.

II. SUMMARY OF THE OMS' POSITION AND RECOMMENDATIONS

The OMS requests that the Commission find the May 19 Filing not in compliance on five points:

- (1) A formal challenge need not have been preceded by an informal challenge on the same issue, but must have been preceded by an informal challenge on some issue (“*any* issue”). The filing parties' compliance error with regard to this issue and the OMS' recommendation for correction is described in Section IV.A.1 of these comments.
- (2) A party submitting a formal challenge cannot be required, as a condition for submitting the formal challenge, to explain why it did not pursue an informal challenge on the particular issue on which it seeks to pursue the formal challenge. The filing parties' compliance error with regard to this issue and the OMS' recommendation for correction is described in Section IV.A.2.a of these comments.
- (3) Because using the process for challenge specified in the protocols to pursue challenges to the filed rate formula itself is not permitted, clarifications are needed so that challenges are properly focused on alleged violations of the protocols or the application of the rate formula, rather than the rate formula itself. This issue is addressed in Section IV.A.2.b of these comments.

¹ See, *Trans Alaska Pipeline System, et al.*, 104 FERC ¶ 61,201, at 61,706 (2003) and *Natural Gas Pipeline Company of America*, 66 FERC ¶ 61,310 (1994) (motion granted for good cause shown).

- (4) Formula rate protocols cannot bar statutorily permitted Section 206 complaints and protocol language that obscures this right is inappropriate. The filing parties' compliance error with regard to this issue and the OMS' recommendation for correction is described in Section IV.B of these comments.
- (5) Existing tariff protocol language regarding "construction schedules and in-service dates" that the Commission had previously approved was improperly deleted. The filing parties' compliance error with regard to this issue and the OMS' recommendation for correction is described in Section IV.C of these comments.

The OMS requests that the Commission direct MISO and the MISO TOs to correct these compliance errors as described herein and further direct them to submit a new compliance filing with those corrections.

III. BACKGROUND

On May 17, 2012, the Commission issued an *Order Initiating Investigation of Formula Rate Protocols and Establishing Paper Hearing Procedures* instituting an investigation pursuant to section 206 of the Federal Power Act to determine whether the formula rate protocols under the MISO Tariff are sufficient to ensure just and reasonable rates.² To address whether MISO's pro forma formula rate protocols and individual MISO transmission owners' ("MISO TOs") formula rate protocols on file with the Commission are sufficient, and to provide MISO, the MISO TOs and other interested parties an opportunity to comment on this investigation through written submissions, the May 17 Order established intervention and paper hearing procedures.

After receiving the submissions in the paper hearing process, on May 16, 2013, the Commission issued an *Order on the Investigation of Formula Rate Protocols*, finding that the MISO and individual company formula rate protocols are insufficient to ensure just and

² *Midwest Independent Transmission System Operator, Inc.*, 139 FERC ¶ 61,127 (2012) ("May 17 Order").

reasonable rates.³ Accordingly, the Commission directed MISO and the MISO TOs that use formula rates to file revised formula rate protocols.⁴

On September 13, 2013, in compliance with the Commission's May 16 Order, MISO and the MISO TOs filed proposed revisions to Attachment O of MISO's tariff to modify the existing formula rate protocols. On October 18, 2013, the OMS filed comments and recommendations regarding the September 13 filings made by MISO and the MISO TOs. On December 5, 2013, the OMS submitted an answer to pleadings made by some parties in these proceedings.

On March 20, 2014, the Commission issued an order conditionally accepting, subject to further compliance, the MISO TOs' September 13 filings.⁵ On April 4, 2014, the OMS submitted a request for rehearing of the March 20 Order. On May 19, 2014, the Commission issued a tolling order regarding OMS' request for rehearing. Also, on May 19, 2014, MISO and the MISO TOs filed the compliance filing on which the OMS comments herein.

IV. COMMENTS

A. Procedures for, and Contents of, Formal Challenges

1. Eligibility to Submit a Formal Challenge.

Section IV.G in Attachments A and B of the May 19 Filing states:

A party may not pursue a Formal Challenge if that party did not submit an Informal Challenge during the applicable Review Period.

The OMS is concerned that this provision is more restrictive than the Commission found permissible in the March 20 Order. In particular, the Commission stated:

Thus, while we are rejecting the proposal to prohibit interested parties from raising any issue in a formal challenge that was not previously raised in the course of that party's informal challenge, we retain the requirement that an interested party submit an informal challenge in order to be able to raise *any* issue in a

³ Midwest Independent Transmission System Operator, Inc., 143 FERC ¶ 61,149 (2013) ("May 16 Order").

⁴ May 16 Order, at P 1.

⁵ *Midcontinent Independent System Operator, Inc.*, 146 FERC ¶ 61,212 (2014) ("March 20 Order")

formal challenge, as this will encourage interested parties to actively engage throughout the process.⁶

The Commission made clear that, in order to be eligible to submit a formal challenge on a particular issue, a party must have participated in the informal challenge process and must have submitted an informal challenge on some issue (“*any issue*”), but need not have submitted an informal challenge on the particular issue pursued in the formal challenge. The Commission explained the rationale for its ruling including that, “an interested party’s awareness and understanding of an issue may evolve as new information becomes available through the course of the informal challenge process.”⁷ In light of the Commission’s clear directive, the OMS recommends that the Commission direct the underlined language to be added to Section IV.G as follows:

A party may not pursue a Formal Challenge if that party did not submit an Informal Challenge on *any issue* during the applicable Review Period.

2. Content Requirements for a Formal Challenge.

a. Clarification on the Necessary Prerequisite for Submitting a Formal Challenge.

Section IV.C(h) of Attachments A and B of the May 19 Filing sets forth a proposed list of content requirements for formal challenges. Included in this list is a requirement on the challenging party to state whether they raised in an informal challenge the specific issue on which their formal challenge is being submitted, and if not, describe why not. Specifically, Section IV.C(h) states:

(h) State whether the filing party utilized the Informal Challenge procedures described in these protocols to dispute the action or inaction raised by the Formal Challenge, and, if not, describe why not.

⁶ March 20 Order, at P 109, emphasis in original.

⁷ March 20 Order, at P 108.

Requiring interested parties to explain whether or not they raised a specific issue in an informal challenge prior to filing a formal challenge exceeds the requirement established by the Commission in the March 20 Order. In particular, the Commission ruled that the original proposal by MISO and the MISO TOs that would prohibit interested parties from raising any issue in a formal challenge that was not previously raised in the course of that party's informal challenge was unreasonable.⁸ As explained in Section IV.A.1 of these Comments, the Commission made clear that, in order to be eligible to submit a formal challenge on a particular issue, a party must have participated in the informal challenge process and must have submitted an informal challenge on some issue ("*any issue*"), but need not have submitted an informal challenge on the particular issue pursued in the formal challenge.

The proposal to require a party to explain whether or not they raised a specific issue in an informal challenge prior to raising that same issue in a formal challenge goes beyond the Commission's directive in the March 20 Order, and is not in compliance. Accordingly, the OMS recommends that the Commission direct Section IV.C(h) of Attachments A and B be revised to delete the language not in compliance and add the underlined language as follows:

(h) State whether the filing party utilized the Informal Challenge procedures described in these protocols ~~to dispute the action or inaction raised by the Formal Challenge, and, if not, describe why not~~ with regard to any issue.

b. Clarification that Challenges are on the "Application" of the Rate Formula Rather than on the Rate Formula Itself.

Section IV.C(1)(a) and IV.C(1)(b) of Attachments A and B require a party pursuing a formal challenge to identify and explain the action or inaction that "violates the filed rate formula or protocols." The challenge process generally addresses a transmission owner's update or projections that produce a charge under a formula rate. The annual update or forward

⁸ March 20 Order, at P 108.

projection is essentially that transmission owner’s application of the filed rate formula. The protocols establish the process by which the annual update or forward projection is conducted and reviewed. In light of this, the OMS recommends that each of these subsections be modified as follows:

- (a) Clearly identify the action or inaction which is alleged to violate the ~~filed rate formula or protocols~~ **or the application of the rate formula;**
- (b) Explain how the action or inaction violates the ~~filed rate formula or protocols~~ **or the application of the rate formula;**

These revisions will help clarify that the focus of the challenge is on alleged violations of the protocols or the application of the rate formula, rather than the rate formula itself. Revising these subsections as proposed here will also make them consistent with Section V.J. of the protocol which provides that “No party shall seek to modify the formula rate under the Challenge Procedures set forth in these protocols and the Annual Update shall not be subject to challenge by anyone for the purpose of modifying the formula rate.”

B. Formula Rate Protocols Cannot Bar Statutorily Permitted Section 206 Complaints.

Section IV.A of both Attachments A and B, as well as all of the Attachment Os of individual transmission owners address challenge procedures and state:

Failure to pursue an issue through an Informal Challenge or to lodge a Formal Challenge regarding any issue as to a given Annual True-Up or projected net revenue requirement shall bar pursuit of such issue with respect to that Annual True-Up or projected net revenue requirement, but shall not bar pursuit of such issue or the lodging of a Formal Challenge as to such issue as it relates to a subsequent Annual True-Up or projected net revenue requirement.

The OMS is concerned with the language “...shall bar pursuit of such issue with respect to that Annual True-Up or projected net revenue requirement...”, which could be interpreted to preclude a party’s statutory right to pursue a Section 206 complaint under the Federal Power Act.

The OMS notes the discussion in the Commission’s March 20 Order regarding the preservation of parties’ Section 206 filing rights,⁹ specifically, the Commission’s reference to a party’s “statutory right to challenge a transmission owner’s update or true-up by filing a separate complaint pursuant to section 206 of the FPA.”¹⁰

The OMS acknowledges the mention of an interested party’s Section 206 complaint rights in Section IV.I of Attachment A and B. However, in the interest of avoiding any confusion between the language in Sections IV.A and IV.I, and given the Commission’s clear and definitive statements in the March 20 Order regarding parties’ Section 206 filing rights, the OMS recommends that the Commission direct the inclusion of the underlined sentence as follows in Section IV.A:

Failure to pursue an issue through an Informal Challenge or to lodge a Formal Challenge regarding any issue as to a given Annual Update shall bar pursuit of such issue with respect to that Annual Update, but shall not bar pursuit of such issue or the lodging of a Formal Challenge as to such issue as it relates to a subsequent Annual Update. Nothing herein shall affect a party’s statutory right to challenge a transmission owner’s true-up adjustment or projected net revenue requirement by filing a separate complaint pursuant to section 206 of the FPA.

C. Expected Construction Schedules and In-Service Dates.

In its comments, the OMS recommended that the protocols require each transmission owner to provide interested parties with data and information on the procurement methods and cost control methodologies used by the transmission owner so that the interested parties have the means to assess prudence.¹¹ In the March 20 Order, the Commission ruled that the six factors detailing the content of information exchanges and document requests proposed in section III of

⁹ March 20 Order, at P 109-112.

¹⁰ March 20 Order, at P 109.

¹¹ OMS Comments, at 34-35.

the transmission owners' proposed Attachment O¹² including the requirement that the TOs provide "any other information that may reasonably have substantive effect on the calculation of the charge pursuant to the formula" adequately responds to OMS' concerns regarding the provision of information on procurement methods and cost control methodologies.¹³ In particular, the Commission determined that factor number five – "the prudence of actual costs and expenditures" - would allow interested parties to request information on the prudence of actual costs and expenditures.¹⁴

The OMS is not herein challenging the Commission's ruling with respect to the provision of information on procurement methods and cost control methodologies. However, the OMS notes that in the May 19 Filing, several MISO TOs¹⁵ deleted existing tariff language in Section VII of the protocol requiring the provision of information including "expected construction schedules and in-service dates." In particular, the MISO TOs deleted the following language:

No later than September 1 of the current year, [MISO TO] shall determine its projected net revenue requirement and load for the following year, in accordance with the Rate Formula Template in this Attachment O[MISO TO]. [MISO TO] shall make available to customers its projected net revenue requirement, including information in workpapers regarding projected costs of plant in forecasted rate base, expected construction schedules and in-service dates, load and resultant rates incorporating a True-Up Adjustment. All inputs shall be provided in sufficient detail to identify the components of [MISO TO's] net revenue requirement. Upon request, [MISO TO] will provide a description of the basis on which projects were planned either by the Transmission Provider or [MISO TO].

¹² The six factors are: (1) the extent or effect of an Material Accounting Change; (2) whether the Annual True-Up or projected net revenue requirement fails to include data properly recorded in accordance with these protocols; (3) the proper application of the formula rate and procedures in these protocols; (4) the accuracy of data and consistency with the formula rate of the calculations shown in the Annual True-Up or projected net revenue requirement; (5) the prudence of actual costs and expenditures; and (6) the effect of any change to the underlying Uniform System of Accounts; or (7) any other information that may reasonably have substantive effect on the calculation of the charge pursuant to the formula.

¹³ March 20 Order, at P 67.

¹⁴ March 20 Order, at P 67.

¹⁵ Michigan Electric Transmission Company, ITC Midwest, Northern States Power Companies, Great River Energy, Missouri River Energy Services, MidAmerican, Allete, Otter Tail Power Company, Ameren Transmission Company of Illinois (ATXI), Ameren Illinois Company, Montana-Dakota, and Dairyland Power Cooperative.

[MISO TO] will hold a customer meeting(s) to explain the formula rate input projections and cost detail¹⁶

The OMS recognizes that some modifications to that paragraph of the protocol may be necessary to conform with the decisions in the Commission’s March 20 Order. But deletion of the entirety of that paragraph, including its content with respect to “construction schedules and in-service dates,” is not in compliance with the Commission’s March 20 Order as that Order did not direct the deletion of that language from Section VII of the protocol. The Commission ruled that the MISO TOs that do not have Attachment O language regarding “construction schedules and in-service dates” need not add it, but the Commission did not direct the MISO TOs that already have that Commission-approved language in their Attachment O to delete it. In the May 16 Order, the Commission recognized the importance of interested parties having sufficient data and information to assess prudence by particularly stating:

we find that during the review period, interested parties must be allowed to obtain upon request information on procurement methods and cost control methodologies used by transmission owners in order to facilitate interested parties’ analysis of whether the transmission owners’ costs were prudently incurred.¹⁷

Accordingly, the OMS recommends that the Commission direct all MISO TOs whose Attachment O contained the referenced language in Section VII prior to May 19, 2014,¹⁸ to restore the content of that paragraph as follows:

[MISO TO] shall make available its projected net revenue requirement, including information in workpapers regarding projected costs of plant in forecasted rate base, expected construction schedules and in-service dates, load and resultant rates incorporating a True-Up Adjustment.

¹⁶ Attachment O, Section VII.

¹⁷ May 16 Order, at P 90, emphasis added.

¹⁸ The OMS would prefer that the provision regarding construction schedules and in-service dates be included in the Attachment O for all MISO TOs, but accept the Commission’s March 20 decision that the MISO TOs that do not already have the provision in their tariff need not include it for purposes of compliance.

The OMS particularly emphasizes the reference to “construction schedules and in-service dates” because that information is not otherwise provided for in the protocol.

V. CONCLUSION

Wherefore, the OMS requests that the Commission find the May 19 Filing not in compliance on five points: (1) a formal challenge need not have been preceded by an informal challenge on the same issue, but must have been preceded by an informal challenge on some issue (“*any* issue”); (2) a party submitting a formal challenge cannot be required, as a condition for submitting the formal challenge, to explain why it did not pursue an informal challenge on the particular issue on which it seeks to pursue the formal challenge; (3) because using the process for challenge specified in the protocols to pursue challenges to the filed rate formula itself is not permitted, clarifications are needed so that challenges are properly focused on alleged violations of the protocols or the application of the rate formula, rather than the rate formula itself; (4) formula rate protocols cannot bar statutorily permitted Section 206 complaints and protocol language that obscures this right is inappropriate; (5) several MISO TOs improperly deleted Commission-approved language in the existing tariff protocol with respect to “construction schedules and in-service dates.” The OMS requests that the Commission direct MISO and the MISO TOs to correct these compliance errors as described herein and further direct them to submit a new compliance filing with those corrections.

The OMS submits this pleading because a majority of the members have agreed to generally support it.¹⁹ Individual OMS members reserve the right to file separate comments regarding the issues discussed in this pleading.

Respectfully Submitted,

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Dated: June 13, 2014

CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated at Tbilisi, Georgia, this 13th day of June, 2014.

William H. Smith, Jr.

¹⁹ The Mississippi Public Service Commission abstained from voting on this pleading. The Manitoba Public Utilities Board did not participate in this pleading.